

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

77-4118

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,

No. 77-4118

Respondents,

S & K FARMS, INC.,
FREIGHT USERS ASSOCIATION OF LONG ISLAND, INC.,

Intervening Petitioners,

SOUTHERN PACIFIC TRANSPORTATION CO., et al.,

Intervening Respondents.

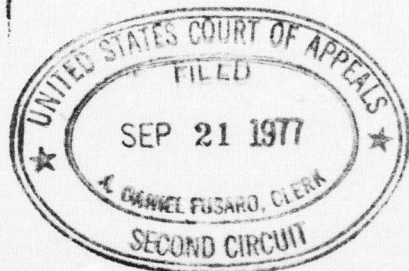
On Petition for Review of an Order of the
Interstate Commerce Commission

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

As was pointed out in the opening brief filed by Petitioner, The Long Island Rail Road Company ("LIRR"), the present action can be traced back to Public Law 93-69, which added a new Section 15a(4) (49 U.S.C. §15a(6)) to the Interstate Commerce Act in 1973. By that law, the carriers were required to incur very substantially higher railroad retirement tax expenses, but were permitted to recapture the increased tax expense through freight rate increases by "any carrier

or group of carriers." The total additional tax expense incurred by LIRR was relatively much greater than that by any other railroad. All the other railroads, except LIRR, acted as a group and sought a uniform increase in freight rates to "pass through" the increased tax expense to the Interstate Commerce Commission ("ICC") finally approved an increase of 2.8 percent in Ex Parte No. 299, Increases in Freight Rates and Charges -- 1973, 350 I.C.C. 673.

Since LIRR's freight revenues totaled less than \$10 million in 1973 and its projected increased railroad retirement tax expense exceeded \$6 million annually, if LIRR had joined with the other railroads, it would have received about \$280,000, or less than 5 percent of its increased tax expense, with the rest going to other railroads as a "windfall." LIRR, therefore, "flagged out" of the general 2.8 percent increase in Ex Parte No. 299, and published a separate terminal surcharge applicable on all freight traffic originating or terminating at points on its lines, with all of the proceeds therefrom accruing solely to LIRR. The ICC originally disapproved LIRR's separate terminal surcharge as an interim measure, but its action was reversed and the surcharge tariff approved by the three-judge District Court in Long Island R. v. United States, 388 F. Supp. 943 (E.D.N.Y. 1974). The ICC itself then approved the 12.5 percent surcharge in Ex Parte No. 299 (Sub-No. 1) (350 I.C.C. at 705-717) at the same time it approved the 2.8 percent general increase for all the other railroads.¹

¹ A petition for review of the ICC's decision and order in Ex Parte No. 299 (Sub-No. 1) was filed by the Southern and Western railroads in the United States Court of Appeals for the Fifth Circuit and is now pending in Civil No. 77-1054, Aberdeen & Rockfish Railroad Company, et al. v. The United States of America, et al. Upon petition of the other railroads, the Commission stayed its order pending resolution of the Court proceeding, so that the LIRR's surcharge is still an "interim" measure, which LIRR is authorized to collect under Section 15a(4)(b) "notwithstanding any other provision of law."

The instant matter is the second case involving the question of how to accommodate the provisions of the new Section 15a(4), which authorizes LIRR to collect its surcharge to offset its increased railroad retirement tax expense, with the provisions of Sections 1 and 3, which guarantee shippers the right to reasonable, nondiscriminatory and nonprejudicial rates.

In the first case, Docket No. 35960, Sunkist Growers, Inc., et al. v. The Akron, Canton & Youngstown Railroad Company, et al., the railroads voluntarily made effective incentive rates, subject to higher minimum weights, at the X-305 level, which were substantially in accord with the initial decision of the Administrative Law Judge, but without providing related or alternative rates to points on LIRR. Division 2, by decision and order served August 4, 1976, found that with respect to destinations on the LIRR, "the failure of defendants to establish alternative rates on the basis of the Ex Parte No. 295 general increase level violates Section 1(5) and 1(6) of the Interstate Commerce Act" and ordered the defendants and LIRR to establish and maintain rates to LIRR at that level.² (Since LIRR had flagged out of Ex Parte No. 299 (2.8 percent) and Ex Parte No. 305 (10 percent), the total charges paid by the LIRR receivers, consisting of the line-haul rates plus LIRR's 12.5 percent surcharge, were substantially the same as those paid by their competitors. It was thought by LIRR that the Sunkist decision had finally resolved the problem of assuring that LIRR would collect its Ex Parte No. 299 (Sub-No. 1) surcharge necessary to meet its increased tax expenses under P.L. 93-69, while at the same

² Copies of the Decision and Order of Division 2 dated July 29, 1976, and of the Orders of the entire Commission dated March 2, 1977 and May 31, 1977, are annexed to the Initial Brief of Petitioner as Addendum A.

time assuring that LIRR shippers and receivers would pay reasonable and nonprejudicial transportation charges, but a petition for review was filed by the other railroads in the U. S. Court of Appeals for the Fifth Circuit and is pending in Civil Action No. 77-1946, The Atchison, Topeka & Santa Fe Railway Co., et al. v. Interstate Commerce Commission, et al.

The rates prescribed by the ICC in the Sunkist proceeding reflect the rate relationships established under the compromise agreement between LIRR and the new Consolidated Rail Corporation ("Conrail") on March 6, 1976, with the concurrence of all other carriers. At that time, Conrail threatened to cancel all joint rates with the LIRR unless LIRR agreed to several general increases from which it had flagged out. In the compromise settlement, LIRR agreed to join in all the previous general increases except for X-299 (2.8 percent) and X-305 (10 percent), so that with LIRR's 12.5 percent surcharge, the total transportation charges paid by LIRR and other receivers in the New York City area would be about the same. Thus, the prior rates to LIRR points on fruits and vegetables from the Southwest were about 12.8 percent lower than to non-LIRR New York City points, and LIRR proposed the establishment of new incentive rates, at an increased level, to LIRR points which would be 12.5 percent lower than to non-LIRR points (136a). The other railroads, of course, refused.

Although the concurrence of the other railroads was required and granted to carry out the LIRR-Conrail agreement, they have tried since that time to disrupt the agreed-to rate structure as it applies to LIRR by attempting to force LIRR either to give up its surcharge

(while continuing to pay \$6 million annually in added taxes) or to accept rates 12.5 percent higher, which would gradually force LIRR out of freight service and its shippers and receivers out of business. In addition to the present Court action, they have tried to cancel joint rates to LIRR points in I.C.C. Docket No. I. & S. 9092, Fresh Citrus Fruit, Transcontinental Eastbound, decided July 1, 1976, and have filed Court appeals not only attacking the Sunkist decision, but challenging the lawfulness of the surcharge itself. They have followed this policy of trying to frustrate the intent of Congress in P.L. 93-69 and to circumvent the statutory provisions at any cost. As shown below, they would receive about 70 percent more in revenues on the involved traffic to LIRR if they accepted LIRR's proposal, instead of trying to force LIRR to accept one of two completely unacceptable alternatives.

In their brief in the present case, the intervening Western railroads³ for the first time are quite candid as to their real objectives and do not try to justify their actions as being in furtherance of legitimate business purposes. While their brief is entertaining at times, they offer little in the way of legal justification for the Commission's action, permitting the destruction of the New York City rate group, probably the most firmly established rate group in the country. See, e.g., The New York Harbor Cases, 1917, 47 I.C.C. 643; Pennsylvania Railroad Company v. United States, 200 F. Supp. 436 (E.D.Pa. 1965), affirmed per curiam, 382 U.S. 368 (1966).

As for the ICC, there is obviously no way its action of

³ None of the Eastern railroads and none of the principal Southern railroads have intervened in the present action.

prescribing properly related alternative rates to LIRR points in the Sunkist case can be reconciled with its refusal to do so in the present case. It attempts to draw some distinctions where there are none. In both cases, Western shippers were parties in the proceedings before the ICC and LIRR receivers were not. While the Sunkist case was initiated by the filing of a complaint and the instant case by the institution of an investigation by the ICC, the ICC can make the same order in both types of cases. See Ayrshire Collieries Corp. v. U.S., 335 U.S. 573 (1940). Like the railroads, the ICC offers no valid justification for its action, or more accurately its refusal to act, in the present case.

As shown below, the briefs filed by the ICC and the other railroads are completely without merit and fail to set forth any rational basis for the ICC's order in this case, which is clearly arbitrary and capricious.

ARGUMENT

The establishment and maintenance of group rates with regard to long-haul traffic such as that involved here is a "nationwide, long continued and judicially approved practice." In The New York Harbor Case, 1917, 47 I.C.C. 643, the ICC recognized as a fact the essential industrial and commercial district centering on the Port of New York.

In Port of N. Y. Authority v. Aberdeen & Rockfish R.R., 321 I.C.C. 738, the ICC disapproved new increased charges on fresh fruits and vegetables from the southern and southwestern areas to certain stations in New York, which were \$57 per car higher than to other

stations in the metropolitan area. In affirming the ICC's decision, the Court in Pennsylvania Railroad Company v. United States, supra, discussed the ICC's holding in The New York Harbor Case, 1917, supra, and said (200 F. Supp. at 538):

"It then pointed out that the establishment and maintenance of parity of long haul freight rates to and from numerous stations dispersed throughout such an extensive industrial or commercial center is a widespread practice of long standing. Thus, group rates, applicable throughout the Oakland-San Francisco area, the area around Hampton Roads which includes the cities of Norfolk, Portsmouth and Newport News, and the great industrial and commercial complex centering on Chicago are examples of this nationwide, long continued and judicially approved practice. See Ayrshire Collieries Corp. v. United States, 1949, 335 U.S. 573, 69 S. Ct. 278, 93 L.Ed. 243; Lighterage Cases, 1934, 203 I.C.C. 481; City of Newport News, Fa. v. Aberdeen & Rockfish R.R., 1929, 159 I.C.C. 159; Oakland Chamber of Commerce v. Southern Pac. Co., 1925, 100 I.C.C. 55."

Between the latter part of 1973 and March of 1976, the New York City rate group was broken up because the other railroads increased the rates to non-LIRR stations in the New York City rate group by virtue of several general freight rate increases. The integrity of the New York rate group was virtually restored by the LIRR-Conrail agreement on March 6, 1976, when the LIRR rates were increased to a level which, with LIRR's surcharge, resulted in approximately equal total transportation charges for all shippers and receivers in the area. The ICC's decision in the Sunkist case continued the policy voluntarily agreed to by the carriers.

In view of the uncontroverted facts as to the rate structure and the long-established principles of law, at the hearings before the ICC in the present case, LIRR made a statement of its position,

but otherwise limited its participation in order not to prolong the hearings needlessly. It seemed to be assumed by all concerned that the ICC would follow its decision in the Sunkist case. The Administrative Law Judge did so in his Initial Decision, but Division 2 then reversed him, finding (109a):

"We find, That the evidence of record fails to establish that the rates to points on the LIRR, when combined with the LIRR's surcharge, [footnote omitted] result in unequal total transportation charges in violation of sections 1(6) and 3(1) of the act; that the record does not show that receivers on the LIRR are unduly prejudiced by the difference in rates and none have appeared or otherwise complained that they are so prejudiced; that in fact, as is noted by the LIRR, the rates to points on its lines are lower than rates to other New York group points because they have failed to join in the new rates; that it is also noted by the parties that a division's dispute is in progress between the LIRR and the other carriers; that the 4R Act establishes new procedures for the handling of division disputes in §15(6)(b); and therefore, it is inappropriate at this time to make any determination on this issue;"

Division 2's findings were clearly arbitrary and capricious and without any rational basis whatsoever. Nothing in the briefs filed by the ICC or the railroads in any way justifies the action taken.

I. REPLY TO THE INTERSTATE COMMERCE COMMISSION

A. There Was No Rational Basis for the ICC's Conclusion That There Was No Violation of Sections 1(6) and 3(1) of the Act.

Throughout its brief, the ICC indicates it is not the least bit sure exactly what the rate situation was or is, or what LIRR was or is seeking. Thus, it states in the one paragraph discussing the Section 1(6) issue (at p. 12) that "there was no evidence of any rate

disparity." The ICC also states (at p. 10):

"Second, the LIRR neither introduced any probative evidence of a rate disparity between rates to Long Island points and nearby points served by other railroads, nor did the ALJ make any such finding. To the contrary, the evidence established the rates applied evenly to all points, including the LIRR."

At the same time, however, the ICC quotes (at pp. 7, 14), its finding that "in fact, as is noted by the LIRR, the rates to points on its lines are lower than rates to other New York group points because they have failed to join in the new rates;"⁴

Then, to complete the confusion, the ICC states in its "Summary of Argument" (at p. 8):

"Here, the Long Island would have this Court direct the Commission to prescribe incentive rates on fresh fruits and vegetables to LIRR points at a level lower than that approved for produce moving to nearby points -- even though no Long Island receivers participated in the rate proceeding or complained of the higher rate level." (Emphasis added)

Thus, depending on what part of the ICC's brief one reads, the rates to LIRR points are either higher or lower than those to other New York area points or there is no disparity. In view of such confusion, it is understandable why the ICC's order lacks a rational basis and is so arbitrary and capricious.

There is no excuse for the ICC's confusion, in view of the fact that there is no dispute as to the actual rate situation. As correctly stated in the Initial Decision of the Administrative Law Judge (40a):

⁴ It was not necessary for LIRR to introduce affirmative testimony as to the rate disparity since it was readily conceded on the record by the traffic witness for the other railroads and their counsel. See Appendix A annexed hereto, pages 2, 7, 8, 14.

"The prior rates which were replaced by the rates here under investigation were unquestionably abnormally low and noncompensatory, and the rates to LIRR points still are. The prior rates at the X-330 level were, of course, about 12.8 percent lower to LIRR points than to other points in the New York City rate group because of LIRR's flag-outs in X-299 and X-305, so that when LIRR's surcharge was applied, LIRR receivers paid about the same total charges as their competitors. At the time the proposed new rates were being considered by the General Freight Traffic Committee--Eastern Railroads, LIRR proposed an amendment to make rates to LIRR points which, when coupled with LIRR's 12.5-percent surcharge, would result in the same total charges as to other points in the New York City rate group. The amendment was voted down, and LIRR was given the choice of maintaining its present low level of rates or accepting the New York basis of rates which, when LIRR's surcharge is added, would virtually preclude any movement. Rather than join in such new rates, LIRR kept its low rates.

"It should be clearly understood that LIRR's proposed amendment would result in more revenues for the respondent railroads, and that the rates proposed by LIRR would still be amply compensatory. For example, from McAllen, Tex., to New York, N.Y., the new rate, subject to a 40,000-pound minimum, is \$5.74 per 100 pounds, while the variable costs are \$4.726, resulting in a revenue-cost ratio of 1.27. The present rate to LIRR points is only \$2.97 per 100 pounds at the X-330 level, and the rate proposed by LIRR would be \$5.10, or almost double the presently effective rate. The \$5.10 rate would produce a revenue-cost ratio of about 1.16, which would still be compensatory, and when the \$5.10 rate is subjected to the 12.5-percent surcharge, the total charges paid by LIRR receivers would be about the same as those paid by other receivers in the New York rate group at the \$5.74 rate without the surcharge. In trying to force LIRR to give up its surcharge and to block the rate relationships prescribed in the Sunkist case, the respondent railroads are willing to forego almost half the revenue they would receive under LIRR's proposal."

As to the relief sought by LIRR before the ICC, this is also clearly set forth in the Initial Decision (40a-41a):

"At the hearing, counsel for the respondent railroads argued that the Commission could not prescribe rates to LIRR points, as it had done in the Sunkist case,

because there has been no notice to LIRR receivers that an increase in their rates was being considered and that they would be denied due process. In an investigation of the type here involved, the Commission does, of course, have very broad powers. In Ayrshire Collieries Corp. v. United States, 335 U.S. 573 (1949), the Supreme Court made it clear that in a proceeding under Section 15(7), the Commission has authority to determine the lawfulness not only of the proposed rates, but also that of existing rates. The new Section 15(8)(f)(1) and (4) under the 4-R Act makes it clear that the new law was not intended to modify the application of Section 3 'in determining the lawfulness of any rate' or 'to affect the authority and the responsibility of the Commission to guarantee the equalization of rates within the same port.' However, in order to avoid any question as to notice or due process, LIRR suggests that the respondents be required to publish related or alternative rates to LIRR points on the statutory 30 days' notice, with such rates being subject to protest and possible suspension and/or investigation."

As to the relief sought in this case, LIRR is not, of course, asking this Court to direct the ICC to prescribe incentive rates to LIRR points, as the ICC alleges. LIRR is asking the Court to find that the ICC's order is without a rational basis, arbitrary and capricious, and to reverse and remand to the ICC for further proceedings consistent with the Court's opinion.

In arguing that there was no Section 3(1) violation, despite the cases holding that disruption of the New York rate group results in such a violation, the ICC states that LIRR did not show any rate disparity and points out that no LIRR receivers intervened to complain.

No LIRR receivers intervened to complain because their total charges, even with LIRR's surcharge, were formerly about the same as those of their competitors, and are now very substantially lower. While shippers frequently complain about rate disadvantages, they

seldom complain about rate preferences. It is the LIRR, not its receivers, which is being hurt. The intervention of LIRR receivers in the present Court action shows they now realize that their present advantage can be turned into a crippling disadvantage if the carriers are given complete freedom to break up rate groups as they see fit.

As to the rate disparity, there is no dispute as to the actual facts, and the ICC specifically found "that, as is noted by the LIRR, the rates to points on its lines are lower than rates to other New York group points..." (109a) Instead of defending the ICC's findings, counsel seems to be trying to impeach them.

The ICC devotes only one paragraph (at p. 12) to defending its principal erroneous finding that the evidence "fails to establish that the rates to points on the LIRR, when combined with the LIRR's surcharge" result in unequal transportation charges in violation of Section 1(6). The only justification offered is that whether "the circumstances and conditions are sufficiently dissimilar to justify differences in rates or charges is a question of fact for the determination of the Commission," and that there was "no evidence of any rate disparity." As pointed out above, the ICC made a specific finding that the rates to LIRR points are lower, and the evidence of record sustains and supports the finding of a rate disparity. Further, if there are any special "circumstances and conditions" in the present case which would justify approval of the break-up of the long-established New York City rate group, the ICC does not mention them.

In short, there was obviously no rational basis for the ICC's conclusion that break-up of the New York City rate group by establishment of the new incentive rates did not result in a violation of

Sections 1(6) or 3(1).

B. The ICC Clearly Erred in Refusing to Correct the Rate Unlawfulness Because of a Divisions Dispute Between the LIRR and the Other Railroads.

In its Decision and Order, dated April 13 and served April 20, 1977, Division 2 found (109a):

"...that it is also noted by the parties that a division's (sic) dispute is in progress between the LIRR and the other carriers; that the 4R Act established new procedures for the handling of division disputes in §15(6)(b); and therefore, it is inappropriate at this time to make any determination on this issue."

Counsel for the ICC argue (p. 15) that in the above finding the ICC "was simply noting the existence of the dispute and stating that it was not an appropriate subject for consideration in this proceeding" and that the "comment had no bearing on its disposition of LIRR's complaint." In other words, the ICC seems to be saying that its findings had no bearing in arriving at its decision.

The railroads, on the other hand, concede what the ICC denies, but argue in their brief (at pp. 18-20) that "the existence of a developing divisions dispute among the railroads further justified the ICC declination to enter an order concerning the differences in rates."

The finding quoted above referring to a divisions dispute was undoubtedly a factor, and perhaps the controlling factor, in the ICC's approval of new incentive rates which applied to all parts of all rate groups except to LIRR points in the New York rate group, without prescribing related or alternative rates to LIRR points. As was pointed out in LIRR's opening brief (pp. 15-17) and hereinbelow (pp. 23-25) in reply to the railroads' brief, there was no issue of

divisions in this case for the ICC to decide, and to the extent the ICC's decision and order was based on the existence of a divisions dispute, the ICC clearly erred.

C. The Decision and Order in the Instant Case Are Completely Inconsistent With the Decision and Order in the Sunkist Case, Docket No. 35960.

As was pointed out in LIRR's opening brief, the ICC's action in the present case is completely irreconcilable with its decision and order in Docket No. 35960, the Sunkist case. Although the ICC in its brief (pp. 16-18) tries to make some distinctions, there are clearly no substantial differences in the material facts which could even remotely justify completely opposite decisions.

The ICC contends that the instant case involved: (1) a carrier initiated rate proposal, (2) no participation in opposition to the proposal by any Long Island receiver, and (3) no evidence of any rate disparity, prejudice or injury, while the Sunkist proceeding involved (a) a shipper complaint that existing rates were unjust and unreasonable, (b) an uncontested finding by the ICC confirming the shipper's contention, and (c) prescription of new rates at a just and reasonable level, including prescription at a just and reasonable lower level to accommodate the LIRR's terminal surcharge. (pp. 17-18)

While the Sunkist proceeding was begun by the filing of a complaint and the instant case was an investigation initiated by the ICC, its powers in both types of cases are the same. In Ayrshire Collieries Corp. v. United States, supra, 335 U.S. 573, the Supreme Court made it clear that in an investigation of this type, the ICC had the authority to pass upon the lawfulness of the existing rates as well as the proposed rates. Here, the existing rates to LIRR points

are slightly more than half the new incentive rates to other New York City destinations, an obviously unlawful situation which the Commission could have corrected, and should have corrected as it did in the Sunkist case.

In both proceedings, the Western shippers intervened and the LIRR receivers (who would continue to enjoy the low rates) did not, so there was little difference in the parties before the ICC.

In the instant case, as in the Sunkist case, the new incentive rates to non-LIRR points were voluntarily established, not prescribed, although in the Sunkist case, the new rates were substantially the same as those recommended by the Administrative Law Judge in his initial decision. The only difference was that in the Sunkist proceeding, the ICC prescribed alternative rates to LIRR points to restore the rate relationship resulting from the LIRR-Conrail agreement, and in this case it refused to do so.

From the above, it is clear that the ICC's brief completely fails to justify its decision and order.

II. REPLY TO INTERVENING RAILROADS

Relying on the theory that if something which is not true is repeated enough times it will be accepted as a fact, the intervening railroads keep insisting that the LIRR is trying to force them to accept "less." This is not so. For example, from McAllen, Tex. to LIRR points in the New York rate group, the rate at the X-330 level, subject to a minimum of 40,000 pounds, was \$2.97 per 100 pounds. Under LIRR's proposal, the new 40,000-pound incentive rate would be \$5.10 at the X-330 level.⁵ (40a) This would result in 71 percent more

⁵ The rates were increased by 4 percent pursuant to Ex Parte No. 336, effective January 7, 1977.

in revenues, not less.

As stated by the railroads (p. 12), LIRR's divisions of the joint rates were increased in 1973, so that it now gets about 7 percent of the revenues produced by the joint rates. The divisions of the Western lines vary from 63.5 to 67.5 percent depending on the gateway and average about 65 percent. Thus, on a 40,000-pound shipment to LIRR points in the New York rate group, the joint rates of \$2.97 produced revenues at the X-330 level of \$1,188.00, out of which the Western lines would get about \$772.20. Under the joint rate of \$5.10 proposed by LIRR, the revenues would be \$2,040.00, and the Western lines' division would be about \$1,326.00. Thus, the Western railroads are now giving up about \$554 per car in revenues they would otherwise be getting in order to try to force LIRR to give up its surcharge.

Much of their argument is contained in their so-called "Statement of the Case." At several points in their brief (e.g., p. 9), the railroads come right out and say that the ICC should direct the LIRR to join in higher joint rates "without terminal surcharge," contrary to the intent of Congress in P.L. 93-69 and in violation of the provisions of Section 15a(4). They do not, however, suggest how LIRR is to avoid paying the \$6 million annually in increased railroad retirement taxes which the terminal surcharge is designed to offset.

It is because their actions are based on pique, rather than sound business judgment, that the railroads' arguments have such a hollow ring. As shown below, they are completely without merit.

A. The New Incentive Rates Clearly Violate Sections 3(1) and 1(6) of the Act.

The railroads argue (pp. 14-18) that there is no evidence of any violation of Section 3(1) or 1(6).

As discussed above, the New York City rate group is one of the oldest and most firmly established in the country. The Commission and the Courts have consistently held that breaking up the group on long-haul traffic, as the other railroads have done here, is a violation of Section 3(1). There is no dispute as to the rates. Instead of joining in increased rates which, with LIRR's surcharge, would result in equal total transportation charges for all receivers in the rate group, the other railroads have forced LIRR to choose between maintaining the present abnormally low rates or joining in increased incentive rates which, with LIRR's surcharge, would be 12.5 percent higher than to other New York City points.

The preferred LIRR receivers did not complain before the ICC about their low rates and the prejudiced receivers in other parts of the New York City rate group were either not too concerned about competition from the few LIRR receivers or assumed that the ICC would prescribe alternative rates to LIRR points. Nevertheless, there is a classic violation of Section 3(1) in the preference and prejudice between LIRR stations and non-LIRR stations in the New York City rate group which the ICC clearly should have corrected.

The railroads have even provided a scenario (pp. 15-16) for the Court and LIRR counsel to follow at oral argument. They suggest, evidently seriously, that the Court ask LIRR counsel if the Section 3(1) problem could not be cured by LIRR giving up its surcharge and joining in higher joint rates, subject to established divisions. To this question, they suggest LIRR counsel would answer "yes," but explain that LIRR wants the ICC to order the other railroads to take "less." Of course, neither the suggested question nor answer makes any sense.

If LIRR were to give up its surcharge, it would continue to pay \$6 million annually in increased railroad retirement tax expense, but the Western lines would get about 65 percent (and the Eastern lines about 28 percent) of the \$6 million in tax-offsetting revenues now received by LIRR under the surcharge. This would obviously frustrate the intent of Congress in passing P.L. 93-69 and Section 15a(4). As to the suggested LIRR answer, LIRR asked the ICC, as explained above, to direct the other railroads to accept about 70 percent more, not less, than they are presently getting under the abnormally low rates to LIRR points.

Suffice it to say that if the railroads' script was for a Broadway-bound show, it would undoubtedly have closed during the try-out out of town long before it ever got to New York.

As to the Section 1(6) violation, the railroads argue that the problem here is a "rate" problem, not a "practice" problem. On the contrary, the problem here stems from the practice of rate grouping. As the Court said in Pennsylvania Railroad Company v. United States, supra, such rate grouping "is a widespread practice of long standing" and is a "nationwide, long established and judicially approved practice." (200 F. Supp. at 538) In support of their argument, the railroads cite Atlantic Coast Line R. Co. v. Cape Fear Railways, Inc., 218 I.C.C. 152 (1936), but that case involved the refusal of a carrier to join in rates over routes which would short-haul that carrier, and had nothing to do with rate grouping or any other issue in the present case.

In the Sunkist case, the Commission correctly found that the refusals to join in alternative rates to LIRR points was a violation of Section 1(6) and the same finding was clearly required here.

B. The Present Negotiations Regarding Divisions Between LIRR and the Other Railroads Was No Excuse for the ICC's Refusal to Prescribe Alternative Rates to LIRR Points.

Unlike the ICC, the railroads admit that the ICC's refusal to prescribe alternative rates to LIRR points was due, in part at least, to the developing divisions dispute between LIRR and the other railroads.

As was pointed out in LIRR's opening brief (p. 16), LIRR received an increase of about 20 percent in its divisions of the joint rates in 1973 as a result of the decision by the ICC in Docket No. 35153. At the present time, as was clearly stated by LIRR on the record, negotiations are going on between LIRR and the other railroads regarding a further adjustment of the divisions of joint rates. But LIRR's divisions are percentages or proportions of the joint rates, regardless of the level of such joint rates. No one was asking the ICC to prescribe new divisions in the present case. When the other railroads tried to inject the question of divisions into this case, the Administrative Law Judge correctly observed that this was not "the right forum for a decision." (134a)

In defending the ICC's refusal to act, the railroads contend that "LIRR wants more money than would be produced for it by the last (1973) divisions adjustment ordered by the Commission." (p. 18) That is not true. LIRR does, of course, expect to receive the surcharge approved by the ICC and the courts to offset its increased taxes, but until the divisions of the joint rates are changed either by voluntary agreement or by order of the Commission, LIRR wants and expects only its present divisions of the joint rates, whatever the level of such rates, in accordance with the 1973 order. No more and no less.

The railroads' agreement is based on the false premise that LIRR's surcharge changed the divisions of the joint rates whereas, of course, it did not. In Ex Parte No. 299 (Sub-No. 1), Increases in Freight Rates and Charges - 1973, 350 I.C.C. 673 (1975), the ICC ruled (at p. 717):

"The joint rates and divisions thereof are unchanged by the surcharge tariff. The surcharge is a separate add-on to the line-haul rates, the yield from which accrues solely to the LIRR, which flagged out of the general increase of respondents. The surcharge is not incorporated in the joint rate, and is not subject to any divisional agreement between the carriers."

There obviously was no "issue" of divisions in this case for the ICC to determine.

So far as LIRR is concerned, the only "issue" which Division 2 had before it was the question of lawful rates to LIRR points within the New York City rate group. As was stated in LIRR's opening brief, Division 2 should have followed the Sunkist decision and required the establishment of alternative or related rates to LIRR points which would have produced equal total transportation charges for all receivers in the New York City rate group or, as the Administrative Law Judge did in his Initial Decision in the present case, it should have disapproved the unlawful rate structure and ordered it cancelled, which would have been, of course, without prejudice to the filing of a lawful rate structure including proper rates to points on LIRR.

Neither the ICC's 1973 decision awarding LIRR increased divisions of joint rates nor the present negotiations regarding a further and future adjustment in any way justified approval by Division 2 of a rate structure which clearly violated Sections 1(6) and 3(1).

CONCLUSION

As shown above, the briefs filed by the ICC and the other railroads completely fail to justify the decision and order of the ICC's Division 2.

For the reasons set forth above and in LIRR's opening brief, the Court should find that the ICC's Division 2 clearly erred in approving a rate structure which resulted in an unreasonable practice in violation of Section 1(6) and in undue preference and prejudice in violation of Section 3(1). The ICC's report and order should be reversed and remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted,

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September 21, 1977

APPENDIX A

TO

REPLY BRIEF OF PETITIONER,
THE LONG ISLAND RAIL ROAD COMPANY

Pages 8 through 22 of the transcript of the public hearing in ICC
Docket No. 36432, Fresh Fruits and Vegetables From The Southwest,
held in Washington, D.C. on Monday, November 15, 1976, before Admin-
istrative Law Judge Warren C. White.

1 I direct Mr. Clayton's attention to page 9, the second
2 paragraph, next to last line -- the phrase, "The non-
3 compensatory nature of the present rates will be shown in more
4 detail by another witness."

5 I believe that should read, "The non-compensatory nature
6 of the prior rates." Would you agree with that, Mr. Clayton?

7 The Witness: Yes, sir.

8 Mr. Smith: May that change be made, sir.

9 Judge White: Yes. Let that change be made.

10 Mr. Smith: That's all I have, Your Honor.

11 Judge White: I believe we have another appearance at
12 this time?

13 Mr. O'Malley: Yes, Your Honor. Joseph O'Malley,
14 representing Consolidated Rail Corporation.

15 Judge White: All right. Fine.

16 You may cross-examine.

17 CROSS-EXAMINATION

18 Q (By Mr. Stokes) Mr. Clayton, as the Assistant Manager -
19 Pricing for Southern Pacific Transportation, do you represent
20 your company on any of the committees in the Southwestern
21 Freight Bureau?

22 A Yes, sir; just recently though, starting with the July
23 meeting of this year.

24 Q But during the period that the commodity in question,
25 fresh fruits and vegetables, were you?

1 A No, sir. I did not represent ESB at the Bureau meeting
2 on this particular proposition.

3 Q But in the course of preparing for this hearing, have
4 you acquainted yourself with the history and the records made
5 before the various rate associations?

6 A Yes, sir, I have.

7 Q Are you familiar with the record made before the Traffic
8 Executive Association, Eastern Railroads?

9 A Yes, sir. I understand that the record made before
10 the eastern railroads was not to apply for the account of the
11 Long Island Railroad.

12 Mr. Stokes: Before going ahead with the Witness, I would
13 ask counsel -- will there be a witness from the TBA, Eastern
14 Railroads, or is this the sole, what we might say, traffic,
15 witness?

16 Mr. Smith: Your Honor, this is the sole, what we might
17 say, traffic witness, except for the Market Dominant Study.
18 But I would point out to Your Honor that -- although I haven't
19 objected yet to any questions -- that the position of Long
20 Island is hostile and antagonistic to that of the Respondents,
21 generally; that the rates involved do not apply to Long
22 Island destinations; and that I think we are shortly going to
23 reach the point at which I will have a remoteness of relevance
24 objection to this line of inquiry.

25 The Long Island is in the best position to say why they

1 did not concur in these rates, if that be relevant in this
2 proceeding.

3 Mr. Stokes: Well, I'll proceed with the Witness, and
4 we will deal with crossing bridges when we come to them.

5 Judge White: All right. Is that true, however, that
6 these rates do not apply to Long Island destinations?

7 Mr. Stokes: That's correct, Your Honor. We had
8 requested a level of rates, which, when coupled with our
9 terminal surcharge approved in Ex Parte 299 Sub 1, would
10 equal this level of rates. This was our -- I'll try and
11 bring this out through the Witness -- but we had requested
12 that, as a counter offer, that this level of rates be put in,
13 and this was refused; and therefore, relegating us -- in
14 essence -- to the other level, or the prior level of rates,
15 or to a level of rates that would have been even higher than
16 this.

17 And it is our contention that this is in violation of
18 Section 1-5 and 1-6 of the Act, as was found by the Commission
19 in the Sunkist Fruit case, which is cited in my petition for
20 intervention.

21 Judge White: Well, I must admit that at this point, I'm
22 a little bit confused, because I don't see how the Respondents
23 can publish two levels of rates just to satisfy your particu-
24 lar railroad.

25 Mr. Stokes: It's being done throughout a whole series of

1 rates, Your Honor. It's because of the unique situation
2 that prevails in regard to the Long Island Railroad, as a
3 result of the 12½ percent terminal surcharge, which was
4 authorized by the Commission in Ex Parte 299 Sub 1.

5 Last winter, when the Long Island Railroad gave its
6 concurrence to various of the Ex Parte increases that it had
7 flagged out of -- and this was done as part of an overall
8 agreement with the rest of the industry -- we continued to
9 flag out of Ex Parte 310 and Ex Parte 299, which together
10 added to approximately 12.8 percent.

11 So from that point on, there was a dual level of rates;
12 a level of rates to Long Island roughly 12½ to 12.8 percent
13 below all of the other rates published in New York, but
14 when which coupled with our 12½ percent surcharge leveled it
15 out.

16 Now, for their own reasons, the other carriers are still
17 very unhappy with our surcharge situation and are refusing to
18 give concurrences to new rates, which when coupled with the
19 surcharge will equal the other rates to New York, New York.

20 This, of course, is a matter of argument, but I'm trying
21 to give Your Honor some of the background of why we're here.

22 It was the same mission that was really before the
23 Commission in the Sunkist case -- I forget the docket number
24 offhand. I'll get it for you in a minute. But the Commission
25 there held that the failure of the carriers to extend a level

1 of rates, or they, in effect, held this -- it's Docket 35960,
2 Sunkist Growers v. A. C. and Y. Railroad. And they, in effect,
3 tell the failure of the carriers to extend a level or rates
4 to Long Island points, which when coupled with our surcharge
5 would equal the New York, New York rate, violated Section
6 1-5 and 1-6 of the Act.

7 Judge White: Yes, but so doing, wouldn't that automati-
8 cally compel the Respondents to take a 12½ percent loss?

9 Mr. Smith: Precisely, Your Honor. Now, I don't propose
10 to argue the full merits of the Long Island position at this
11 juncture. But since we are giving some introductory back-
12 ground here for Your Honor's benefit, because you've not
13 been involved in this dispute before, the Long Island suc-
14 ceeded in publishing a terminal surcharge of 12½ percent ,
15 which it keeps for itself, and the 12½ percent goes entirely
16 to the Long Island and is not shared with anyone else.

17 But not content with that, they then wanted the other
18 railroads to agree to publish a generally lower basis of
19 joint rates with Long Island, so that their 12 percent which
20 they kept, plus their division of the through-rate was all
21 theirs, and yet the overall rate level was no higher than at
22 other points in the territory.

23 Now, understandably, there was some objection on the
24 part of the other railroads to this program. Now, where we
25 find ourselves at the present time is the Long Island --

1 which I think Your Honor recognizes -- this is basically a
2 divisions dispute.

3 The Long Island has instituted proceedings under the
4 new 4-R Act for institution of the divisions case. And under
5 the 4-R Act, when one carrier wants to change divisions, there
6 are a series of steps that are to be followed: Formal
7 notice must be given to the other carriers of the proposed
8 readjustment divisions; six months of negotiation in good
9 faith, followed by formal proceedings before the Commission.

10 Now, they've gone through the notice phase. They've
11 had their first conference with the other lines; the six-
12 month period is running. Frankly, I don't know what they're
13 doing in here.

14 And I say this from the viewpoint, Your Honor, that as
15 a matter of due process and notice, you cannot give the Long
16 Island the relief which it apparently is going to ask you
17 for in this proceeding, for one simple reason. And that is,
18 as a matter of due process and as a question of notice, nobody
19 has told the receivers on the Long Island Railroad that this
20 proceeding is being converted to an instrument for raising
21 their rates.

22 Now, at the present time, the receivers on the Long
23 Island have a very fortuitous, happy circumstance, because
24 the Long Island refused to concur in the new publication.
25 Because the Long Island refused to cancel the old rates,

1 there's a little pocket of low rates from the Long Island
2 Railroad.

3 Now, if the Long Island gets the relief that it wants
4 here, those rates are going up.

5 Now, it is the law that when the railroads want to in-
6 crease rates, we do it in one of three ways: You file a
7 tariff, and this provides notice to the receivers, shippers
8 affected. Or you file a complaint, or you file some petition
9 before the Commission which is given full notice -- generally,
10 publication in the Federal Register, or a wide spread circula-
11 tion. You provide notice, in fact, to the receivers whose
12 rates are going to be affected.

13 Now, none of this has happened here. The Long Island
14 has filed a petition for leave to intervene in this proceeding
15 and, of course, the Commission is not going to keep any
16 railroad out of an investigation proceeding, if a railroad
17 wants to come in and participate.

18 Nobody has told the receivers on the Long Island Railroad
19 that this proceeding is sought to be converted by the Long
20 Island into a vehicle for substantially increasing their
21 rates.

22 Now, as a matter of due process, you can't order it here,
23 and it cannot be done.

24 Now, I think that concludes my preliminary remarks, Your
25 Honor, but I, frankly, feel that the Long Island's entire

1 participation in this proceeding is misplaced, and this is
2 the wrong time, the wrong place, and not the right forum to
3 make their point.

4 Mr. Stokes: Well, the points raised by Mr. MacDonald
5 are very perfect to be argued on brief, I believe. Meanwhile,
6 our petition for intervention has been granted, and we are
7 here and I would like to complete my record.

8 But as Your Honor can understand, it is a dispute
9 between the Long Island and the rest of the industry. But
10 just so you're not under any illusionment about this 12½
11 percent -- this was a specific surcharge authorized by
12 Public Law 9369, a specific pass through of the additional
13 railroad retirement costs. And that's all it represents.

14 Rather than do it through a general increase in con-
15 junction with the other carriers, so that they take their
16 division of this -- and the Southern Pacific and these other
17 railroads have for many years gotten rich on the windfall,
18 you might say, they received from the costs of the eastern
19 carriers, because the law was worded the way it did -- we
20 took advantage of the word in the law to be sure that this
21 time we would recapture our own costs. And this is what
22 the surcharge is -- is recapturing an additional Long Island
23 Railroad cost.

24 They don't incur the cost, and therefore, the revenues
25 from this surcharge are not to be shared with them.

1 So I just don't want this talk about our not sharing
2 the revenues from the surcharge with them as being something
3 underhanded or sneaky or improper. This is specifically what
4 Public Law 9369 provided.

5 Judge White: But by its very nature, a surcharge is
6 something over and above. And wouldn't that surcharge not
7 have to be placed on top of any published rate; not only
8 the prior rates, but the present rates?

9 Mr. Stokes: That's right. And the thing is -- what
10 I'm going to try and bring out here through this Witness or
11 through my own witness is that when these rates were proposed
12 in front of the TEA Eastern Railroads, we made the counter-
13 offer, seeking a level of rates that would be 12½ percent
14 below what's under investigation in this proceeding, which,
15 when coupled with our surcharge, would have been the same as
16 the other rates.

17 But that this was turned down by the other carriers, and
18 consequently, we were in the position that we would either
19 then have to accept a level of rates 12½ percent above this,
20 or retain the old, depressed rates.

21 Until such time as we can straighten the thing out,
22 rather than impose an even higher burden on the shippers and
23 receivers in Long Island by going 12½ percent above this
24 level of rates, we have retained the old, depressed level
25 of rates. And we are seeking to get this situation

1 straightened out.

2 Now, whether it's to be done by ordering a new --
3 and prescribing a level of rates in this case, or whether it's
4 to be done by other relief, that's to be argued on brief,
5 and we'll come to that when it's appropriate.

6 Judge White: But you say the Commission has already
7 considered this issue, and given you a favorable decision?

8 Mr. Stokes: Yes, Your Honor; that's precisely our
9 position. That was in the case I cited, Docket 35960, Sunkist
10 Growers v. A. C. and Y. Railroad.

11 I will say there has not been a final decision on that.
12 The other carriers are somewhat unhappy with it, did petition
13 for reconsideration, and the reconsideration is pending. But
14 Division 2 did issue an order upholding and favoring the
15 position of the Long Island Railroad in that proceeding.

16 Judge White: If that case is going to be conclusive
17 of that particular issue, I suppose it would have broad
18 application and would apply to this case.

19 Apparently, the Commission may have had that in mind
20 when they permitted you to intervene. In that case, is there
21 any possibility of eliminating your interests by tying this
22 case to whatever the ultimate decision is in that proceeding?

23 Mr. Stokes: If the other carriers would agree that upon
24 a final determination by the Commission in the Sunkist case,
25 that they would voluntarily extend to us a level of rates,

1 which, when coupled with our surcharge, is equal to this,
2 I'll pack up and leave right now, Your Honor.

3 Mr. Smith: Well, Your Honor, our problem is this:
4 I'm not sure that the Sunkist proceedings to which counsel
5 referred is really on all fours with our situation.

6 The Sunkist proceeding started off with a complaint by
7 the Sunkist growers and the California citrus shippers asking
8 that a specific scale of rates be prescribed to points in the
9 east. It was a complainant proceeding in which the Administr-
10 ative Law Judge recommended the prescription, essentially,
11 of the scale of rates prescribed by, or sought by, Sunkist.

12 The railroads elected to voluntarily accept the scale
13 proposed by Judge Dolan; the railroads except the Long Island.
14 The railroads throughout the country published the scale,
15 thereby rendering the controversy substantially mute, except
16 the Long Island, because of its controversy, refused to
17 concur, forcing Sunkist to go forward and ask the Commission
18 for a final order as to the Long Island Railroad points.

19 The Long Island indicated that it would be happy with
20 a prescription of something lower, which would allow them
21 to keep their 12½ percent surcharge without exceeding the
22 general level prescribed to Group A.

23 And the Commission Division 2 went along with that in
24 a brief order. Now, we have filed, I think, a rather strong
25 petition for reconsideration. And I think there's a fairly

1 strong likelihood that the matter may wind up in court.

2 In view of this, in view of the fact that I don't think
3 the situation is necessarily on all fours, in view of the
4 fact that there has not been notice in this proceeding to
5 the receivers on Long Island as there was in the Sunkist
6 case, I'm not in a position to stipulate that the disposition
7 of Sunkist will govern the Long Island's position in this
8 case. I just can't do it.

9 We feel that basically there is a divisions dispute
10 brewing here, the steps have been instituted under the 4-R
11 Act to resolve it, and that will be the time and place to
12 resolve it.

13 Now, our offer to the Long Island -- and the other
14 railroads have had a standing offer -- join us, concur in,
15 these rates, and accept, for the time being, the divisions
16 that have applied for many, many years between us. If you're
17 unhappy with them, continue pursuing your remedies under
18 the 4-R Act before the Commission for an adjustment. But
19 meanwhile, we're ready, willing, and eager to have the Long
20 Island concur in these rates. The door is open; all they
21 have to do is say yes, and the rates will apply.

22 And whether they, then, apply their 12½ percent sur-
23 charge to the rates to their destinations, that's their
24 decision to decide. If they want to take the 12½ percent
25 surcharge, we have no objection to it. They'll have to work

1 that out with their shippers. As far as the other railroads
2 are concerned, it's all right with us.

3 Judge White: I would assume from the name "Sunkist",
4 that that involves citrus, primarily or solely. Whereas,
5 here you're not interested in citrus particularly; isn't
6 that right?

7 Mr. Smith: Citrus was the only commodity involved in
8 Sunkist. Whereas, this is fruits and vegetables generally
9 out of Texas.

10 Judge White: This includes citrus, but I know this is
11 a very minor part of your adjustment. I think -- what was it,
12 you handled only five carloads, or something like that,
13 according to your statistics?

14 The Witness: That is right.

15 Mr. Smith: I think the rail movement of citrus out
16 of Texas now is negligible, de minimis.

17 Judge White: I don't know whether that would have
18 any affect or impact or not, but I think I understand the
19 positions of the parties a little bit better now. And you
20 may proceed.

21 Mr. Stokes: Thank you, Your Honor.

22 Q (By Mr. Stokes) Mr. Clayton, as I understood your last
23 answer, way back when, you did say you were familiar with
24 the record made before the Traffic Association; Eastern
25 Railroads? Is that correct?

1 A Well, I would qualify that a little bit. The record
2 that ordinarily -- see, the Southern Pacific Railroad does
3 not operate in eastern territory. So we do not sit on that
4 committee.

5 The records that we normally see in the Houston office
6 of the Southern Pacific are only the records which have been
7 approved by eastern territory, and not those that are
8 disapproved.

9 Q So you would not really have any knowledge of --

10 A The discussion --

11 Q -- the counter-offer that the Long Island may have made
12 in the TEA Eastern Railroads?

13 A Not the details of it; no, sir.

14 Q Are you aware that the Long Island did make such a
15 proposal?

16 Mr. Smith: Well, I object, Your Honor. It's irrelevant.
17 He doesn't know what they did or didn't. So what if they
18 did.

19 Mr. Stokes: He says he doesn't know the details of it.
20 But I'm asking the Witness whether he knows a counter proposal
21 was made by the railroads.

22 Judge White: Can you answer it?

23 The Witness: Yes, sir; I can answer it.

24 Judge White: All right. You may.

25 The Witness: I do not.

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1 Q (By Mr. Stokes) You do not?

2 A I do not.

3 Q Now, at any rate, although I'm aware that there will be
4 a cost witness coming on, it is my understanding that the
5 railroads proposed this rate because the existing -- or the
6 level of rates existing prior to this were depressed and
7 non-compensatory. Is that correct?

8 A Yes, sir.

9 Q And with the non-extention of the rates to stations on
10 the Long Island Railroad, what level of rates prevails there
11 now?

12 A Well, it's my understanding of the tariff that the
13 rates which existed prior to those that are presently in
14 effect are still continued for the account of the Long
15 Island Railroad.

16 Q And those are the rates, that in this proceeding, the
17 other carriers are contending are not compensatory rates.

18 A For our account; yes, sir.

19 Mr. Stokes: I have nothing further at this time.

20 Judge White: All right.

21 Mr. Kolins: Thank you, Your Honor.

22 A couple of prefatory matters. I would begin by moving
23 to strike Exhibit Number WMC-2, WMC-3, and WMC-4; those
24 are the last three of the four exhibits that are attached
25 to Mr. Clayton's statement.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

THE LONG ISLAND RAILROAD COMPANY,

Petitioner,

77-4118

-against-

THE UNITED STATES OF AMERICA, and THE
INTERSTATE COMMERCE COMMISSION,

AFFIDAVIT OF
SERVICE

Respondents,

S&K FARMS, INC., and FREIGHT USERS ASSOCIA-
TION OF LONG ISLAND, INC.,

Intervening Petitioners,

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, MISSOURI PACIFIC RAILROAD COM-
PANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, and UNION PACIFIC RAILROAD COM-
PANY,

Intervening Respondents.

-----x

STATE OF NEW YORK)

: ss.:

COUNTY OF QUEENS)

Kathleen E. Williams, being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age, and resides at Massapequa Park, New York. On September 20, 1977, deponent served two copies of the Reply Brief of Petitioners upon counsel for each party separately represented by depositing true copies of same enclosed in a postpaid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, directed to the attorneys named at the addresses set



opposite respective names as follows:

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Attorney for Intervening-Respondents

Kathleen E. Sullivan

Sworn to before me this

20th day of September 1977.

SEAL

Mary Gallo (Boron)
Notary Public

MARY GALLO
NOTARY PUBLIC, State of New York
No. 52-1365325, Suffolk County
Term Expires March 30, 1979

Sir :-

Please take notice that the within is a true copy
this day duly entered herein in the Office of the Clerk

Dated, 19

Yours, etc.,
GEORGE M. ONKEN

Attorney for

Office and Post Office Address
Jamaica Station
Jamaica, N.Y. 11435

To , Esq.

Attorney for

Sir :-

Please take notice that the within

will be presented for settlement and signature herein
to the Hon.

one of the Judges of the within named Court, at

in the

on the day of

19 , at M.

Dated, 19

Yours, etc.,
GEORGE M. ONKEN

Attorney for

Office and Post Office Address
Jamaica Station
Jamaica, N.Y. 11435

To , Esq.

Attorney for

Clerk's Index No. 77-4118 Year 19

UNITED STATES COURT OF
APPEALS : FOR THE
SECOND CIRCUIT

THE LONG ISLAND RAILROAD
COMPANY,

Petitioner,

-against-

THE UNITED STATES OF
AMERICA , and THE INTER-
STATE COMMERCE COM-
MISSION,

Respondents,

S&K FARMS, INC., and
FREIGHT USERS ASSOCIATION
OF LONG ISLAND, INC.,

Intervening Petitioners,
SOUTHERN PACIFIC TRANS-
PORTATION COMPANY, et al.

Intervening Respondents.

AFFIDAVIT OF
SERVICE

GEORGE M. ONKEN

Attorney for The Long
Island Rail Road Company
Jamaica Station,
Jamaica, N.Y. 11435

(212) 526-0900

Service of a copy of the within

is hereby admitted.

Dated,

Attorney for

Sworn to before me on

19

State of New York, County of Queens, ss.:
being duly sworn, deposes and says: Deponent is not a
party to the action, is over 18 years of age and resides at
On 19 , deponent served the within
by depositing a true copy of same enclosed in a postpaid wrapper, in an
official depository under the exclusive care and custody of the United States Postal Service within
the State of New York, directed to the attorney named at the address set opposite respective name
as follows: